PD-0174-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/6/2018 10:48 PM
Accepted 7/9/2018 9:58 AM
DEANA WILLIAMSON
CLERK

No. PD-0174-17

FILED
COURT OF CRIMINAL APPEALS
7/9/2018
DEANA WILLIAMSON, CLERK

COURT OF CRIMINAL APPEALS OF TEXAS

RICARDO ZUNIGA, Appellant

vs.

THE STATE OF TEXAS

APPELLANT'S MOTION FOR REHEARING

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

Ricardo Zuniga, Appellant, respectfully requests rehearing of the Court's decision in this case, issued on June 6, 2018.[1] As grounds for this motion, Appellant presents the following arguments and authorities.

STATEMENT OF THE CASE

Zuniga was convicted of capital murder and two counts of engaging in organized criminal activity to commit the underlying murders. On appeal, the Eighth Court reversed the engaging convictions finding insufficient evidence to support the convictions. This Court granted the State's petition, reversed the Eighth Court and reinstated the engaging convictions.

[1] Appellant was granted an extension until July 6, 2018 to file his motion for rehearing.

ARGUMENT AND AUTHORITIES

This Court's interpretation of the Texas engaging statute effectively eliminates any mental state requirement for cases involving gangs. Per the Court's holding, if a gang member commits one of the crimes enumerated in the engaging statute, he is necessarily guilty of engaging in organized criminal activity. While both this Court and the State concede that there should be "a connection or nexus between the defendant's commission of the underlying offense and his gang membership", this Court's ultimate resolution of the issue fails to require any such connection or nexus. *Zuniga v. State,* No. PD-0174-17, 2018 WL 2711145, at *3 (Tex. Crim. App. June 6, 2018).

I. Hypothetically Correct Jury Charge for Engaging

This Court errs at the outset when it holds that the court of appeals interpretation of the engaging statute "results in an illogical reading of the statute that conflicts with the requirement that we must construe statutory terms in accordance with the rules of grammar and common usage." The statute, as written provides:

> "[a] person commits an offense if, with the intent to establish, maintain, or participate in a combination **or** in the profits of a combination **or** as a member of a criminal street gang, the person commits or conspires to commit one or more of the following:"[.] TEX. PENAL CODE § 71.02(a). (emphasis added)

This Court concludes, without explanation, that the statute's intent clause applies only to the phrase "in a combination or in the profits of a combination" but not to the phrase, "or as a member of a criminal street gang [.]" *Zuniga* at *4. Zuniga respectfully submits that such an interpretation is illogical and incorrect.

A "combination" and "a criminal street gang" are almost identical in that they both refer to a group of three or more people who collaborate or associate in the commission of criminal activities. TEX. PENAL CODE § 71.01(a) & (d). Ostensibly, a combination can be used to charge a group that does not rise to the level of a criminal street gang but is nonetheless involved in collaborating or associating to commit criminal activities. Why the intent portion of the statute would only apply to a combination but not to a criminal street gang is unclear.

For arguments sake, counsel will assume that this Court found the court of appeals interpretation of the statute to be illogical because the modifiers "establish" and "maintain" are confusing when read in conjunction with "as a member of a criminal street gang". However, the same is true when the modifiers "establish" and "maintain" are used in conjunction with "in a combination".

Of the three modifiers – establish, maintain, or participate – the first two are intended to modify the profits of a combination. The last modifier – participate - is intended to modify "in a combination" or "as a member of a criminal street gang."

In choosing to charge individuals, the State can choose the appropriate modifiers, i.e. the requisite intent, based on the specific facts of the case. In this case, if the State wanted to be precise and concise, it would have alleged that Zuniga, with intent to participate as a member of a criminal street gang did commit the offense of murder. This interpretation of the statute makes the most grammatical and logical sense. It does not lead to absurd consequences and it permits only one reasonable understanding of what is prohibited. *Boykin v. State,* 818 S.W. 2d 782, 785(Tex. Crim. App. 1991). Every word is given meaning and the portion of the statute that reads "participate in a combination **or** in the profits of a combination **or** as a member of a criminal street gang," is left intact without any unexplained modifications. More importantly, under this interpretation, the gang portion of the statute contains an intent requirement and this Court is not be required to resort to extra-textual factors to come up with the requisite intent. See *Bryant v. State,* 391 S.W. 3d 88, 92(Tex. Crim. App. 2012).

This Court's reliance on *Villa* is misplaced. The only issue in *Villa* was whether there was sufficient evidence of Villa's gang membership. *Villa v. State,* 514 S.W. 3d 227, 232(Tex. Crim. App. 2017). *Villa* had nothing to do with the connection or nexus between the defendant's commission of the underlying offense and his gang membership. *Villa* makes no mention of the hypothetically correct

jury charge and references the engaging statute only in passing to discuss gang membership. *Id.* The State in *Villa* did not rely solely on the gang expert to say that gangs commit crimes and therefore, the jury should infer the crime was gang related because gang members were involved. It presented evidence that the complainant was a former member of the Barrio Azteca, was the subject of a Barrion Azteca "green light" or "hit" and was subsequently attacked by a group of Barrio Aztecas. From these facts and others, the jury could infer, without resorting to speculation, that the offense was gang related.

This court concludes that in order to prove an engaging offense, the State must prove that the defendant was acting "in the role, capacity, or function of" a gang member. *Zuniga* at *4. In theory, this is no different than requiring the State to prove that the defendant intended to participate in the listed offense as a member of a criminal street gang. However, under Zuniga's proposed interpretation of the statute, the application paragraph of the trial court's charge would necessarily contain this language since the State would be required to allege it in the indictment and the court's charge would track the indictment. Under this Court's interpretation of the statute, either the trial court's charge would omit this language completely or, the trial court would be required to add additional language into the application paragraph that is not contained in the indictment. The former makes

sense, the latter does not.[2]

II. Sufficiency of the Evidence

Contrary to this Court's assertion, the court of appeals did not require "proof of the gang member's particular motivation for committing an offense." It simply required proof, direct or indirect, that the offense was somehow related to Zuniga's status as a gang member. "[The State's evidence] is not sufficient to establish that Appellant had the requisite intent to commit the offense as a member of a criminal street gang." *Zuniga v. State,* No. 08-14-00153-CR, 2016 WL 5121992, at *13

The court of appeals correctly held, that it was not enough to simply show that Zuniga was Barrio Azteca and it was not enough to speculate that the offense could have been committed for gang related reasons. More importantly, the court of appeals avoided considering excluded evidence in its sufficiency analysis. [3]

---

[2] In footnote 6, this Court states that the engaging statute already requires proof that the defendant was acting in his capacity or role as a member of a gang. Therefore, it would not make sense to have participate further modify "as a member of a gang". However, this is incorrect. This language is not contained in the statute. This Court interprets "as" in the phrase "as a member of a criminal street gang" as requiring "in the role, capacity or function of" a gang member, in order to create a nexus or connection between the offense and membership in a gang. A plain, simple reading of the statute, as suggested by counsel, avoids the need to interpret undefined words in order to fill in blanks for a missing state of mind. More importantly, it allows the application paragraph of the trial court's charge to simply track the indictment without the need to add undefined words into the mix.

[3] In *Gomez v. State*, a co-defendant of Zuniga, the court of appeals found the evidence sufficient to support Gomez's engaging conviction. In the Gomez case, there was evidence that a Barrio Azteca member told Gomez, also a Barrio Azteca member, that those guys owed him money. Gomez himself admitted that he went to the A&M Bar and asked the victims for a fee, (consistent

Throughout trial and throughout this appeal, the State has repeatedly emphasized evidence that it sought to present but was unable to because of issues of confrontation and hearsay. The State's theory has always been that the Vargas brothers were killed because they were selling drugs on Barrio Azteca turf without paying the required fee. This theory was presented at opening, at closing over objection, and again on appeal. During the trial at closing, the State attempted to argue the theory even though its evidence had been excluded and the defense objections to these arguments were sustained. The court of appeals correctly refused to consider that evidence in conducting its sufficiency analysis.

However, this Court, in conducting its sufficiency review, latches on to the State's theory of the case and includes in its analysis facts that were excluded and ultimately, unproven at trial. In listing the facts that support the conviction, this Court states "it would be consistent with Barrio Azteca activities for members to commit an assault against **rival gang members who encroached upon their territory or failed to pay a fee;**" *Zuniga* at *7 (emphasis added). It also states

---

with the drug tax or "cuota" collected by Barrio Aztecas) and Gomez was identified as having stabbed one of the victims. *Gomez v. State*, No. 08-12-00001-CR, 2014 WL 3408382 (Tex. App. –El Paso, July 11, 2014, no pet.)(not designated for publication). The court of appeals did not require proof of a motive, it simply required evidence from which it could be reasonably inferred that the offense was related to gang activity.

"the Vargas brothers were confirmed members[4] **of a rival gang that was involved in illicit narcotics trafficking;**" *Id.* To illustrate the speculative nature of these statements and this Court's error in relying on these statements, one need only fill in the blank with any of a myriad of offenses that gangs typically engage in. One could say "It would be consistent with Barrio Azteca activities to rob people at gunpoint in a parking lot" or "it would be consistent with Barrio Azteca activities to kill someone that disrespected the gang". However, the only way these statements can support a conviction for engaging is if there is some evidence in the record that this is actually what happened. Otherwise, these possible scenarios amount to nothing more than speculation. While the jury is permitted to draw reasonable inferences from the evidence, it is not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Hooper v. State,* 214 S.W. 3d 9, 15 (Tex. Crim. App. 2007). Although a conclusion reached by speculation may not be completely unreasonable, it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. *Id.* at 16.

This Court further errs by assuming facts not proven at trial, primarily that Zuniga or any other Barrio Azteca knew that one Vargas brother was currently a rival gang member and that the other Vargas brother was an inactive rival gang

[4] Jesus Vargas was an **inactive** member of the Barrio Campestre Gang. R. 8:95.

member. Absent proof of these facts, it is of no import that law enforcement classified the decedents and the Barrio Aztecas as rival gang members. It is also of no import that Sparky had to "do his job" and refused to do so, without any contextual information regarding the statement. The State is then left with evidence that Barrio Aztecas killed the Vargas brothers at a place where Barrio Aztecas were known to hang out.

Engaging in organized criminal activity increases the punishment range for a particular offense. The State is not required to charge engaging. In this case, it could have charged Zuniga with two counts of murder. However, once it chose to charge him with engaging, it was required to prove, beyond a reasonable doubt, that the offense was motivated by or related to Zuniga's membership in the gang. Absent such a requirement, every crime committed by a gang member would necessarily constitute the offense of engaging in organized criminal activity.

The State concedes, and this Court agrees that the statute requires more. *Zuniga* at *3. Yet this Court's ultimate application of the law to the facts of this case effectively holds that gang membership coupled with the commission of an offense equals engaging in organized criminal activity. Every engaging case involves a state expert that will testify that gang members participate in every type of crime listed in the penal code, most notably, the eighteen crimes that can be

charged under the engaging statute. TEX. PENAL CODE § 71.02(a). Absent the "intent to participate" language advocated by Appellant and required by the court of appeals, the evidence will always be sufficient to prove engaging in organized criminal activity if a gang member commits a listed offense. This is clearly not what was intended by the legislature when it enacted the engaging statute.

PRAYER

Appellant prays that this Court reconsider its opinion dated June 6, 2018 and upon reconsideration, affirm the Eighth Court's reversal and acquittal on the two engaging counts.

Respectfully submitted,

/s/ Ruben P. Morales
RUBEN P. MORALES
ATTORNEY FOR APPELLANT
State Bar No. 14419100
718 Myrtle Avenue
El Paso, Texas 79901
(915) 542-0388
(915) 225-5132 fax
rbnpmrls@gmail.com

CERTIFICATE OF SERVICE

I certify that on July 6, 2018, a copy of Appellant's Motion for Rehearing was sent by email, through an electronic-filing-service provider, to petitioner's attorney: Raquel Lopez, raqlopez@epcounty.com.

I further certify that on July 6, 2018, a copy of Appellant's Motion for Rehearing was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Ruben P. Morales
Ruben P. Morales

CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,924 words, as indicated by the word-count function of the computer program used to prepare it and complies with the applicable Texas Rules of Appellate Procedure.

/s/ Ruben P. Morales
Ruben P. Morales